

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FREDKIEY HURLEY, individually,

Index No.: 15-cv-2785 (GBD)(HBP)

Plaintiff,

-against-

TOZZER, LTD. d/b/a NIAGRA,

AFFIDAVIT IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT

Defendant.

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STATE OF NEW YORK)
):ss.
COUNTY OF NEW YORK)

BEFORE ME, the undersigned authorized to take oaths, this day personally appeared LAURA FLAUTO-MCCARTHY, affiant, who first being duly sworn, deposes and says:

1. I am a shareholder and the President of TOZZER, LTD, which that leases the subject store front and operates a bar called Niagara at 112 Avenue A, New York, New York. I am fully familiar with the facts set forth and described herein based upon my personal knowledge.

2. I submit this affidavit in support of Defendant's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

3. 112 Avenue A, New York, New York is an old law tenement that consists of a store front on the ground level and six (6) residential apartments above built between 1879 and 1901. TOZZER, LTD has no involvement with the apartments or an ownership interest in the building. But I have personal knowledge concerning the store front and the bars that have operated there since the 1980s.

4. From approximately 1980 to 1984 the bar operating at 112 Avenue A was called A7. Many music enthusiasts believe that A7 started the punk and hardcore music scene in the City of New York because it was the first venue to invite such bands to perform for its patrons. Jesse Malin, another shareholder of TOZZER, LTD, and I were patrons of A7.

5. A7 closed for business sometime in 1984 and a bar called King Tut's Wah Wah Hut occupied the space thereafter. I recall that King Tut's Wah Wah Hut remained there until the end of 1991, when the landlord of the building offered to lease me the space.

6. TOZZER, LTD was incorporated solely for the ownership of the bar at 112 Avenue A, and leased the store front on or about January 13, 1992. I have been a shareholder and President of TOZZER, LTD since its inception. A true and accurate copy of the New York State corporate information for TOZZER, LTD. is attached to this affidavit.

7. After TOZZER, LTD leased the subject space, the bar remained closed for a short period of time, during which we painted and cleaned. My partners and I decided that we wished preserve the historical significance of the bar so we did not any changes to entrance, bar, interior steps, bathrooms and the configuration of the bar.

8. In October 2013, a plaque was hung in the rear performance area to mark the history associated with the space. A true and accurate photograph of the plague is attached to this affidavit.

9. The entrance to Niagara, including the two exterior steps, is the same entrance and steps that was used by A7. TOZZER, LTD has not made any renovations or changes to the entrance or two steps.

10. The bar at Niagara is the same bar that was used at A7. TOZZER, LTD has not made any renovations or changes to the bar.

11. The interior stairs leading to the restrooms are the same interior stairs as when A7 occupied the space. TOZZER, LTD has not made any renovations or changes to the interior stairs leading to the restrooms.

12. The restrooms, including their dimensions and doors, are the same as it was when A7 occupied the space. TOZZER, LTD has not made any renovations or changes to the restrooms.

13. Thus, TOZZER, LTD has not made any changes or renovations to the entrance, two exterior steps, bar, three interior steps leading to the bathroom and the bathrooms. The only worked performed by TOZZER, LTD to the subject areas was general maintenance, painting, cleaning, lighting and replacing any equipment that broke.

14. I have reviewed the Plaintiff's alleged expert report, which merely lists alleged violations. The report does not address compliance feasibility or propose methods of remediation. Accordingly, I am unable to evaluate any purposed methods of compliance and whether they are ready achievable.

15. The sidewalk abutting the entrance to Niagara is owned by the City of New York. The construction of the required ramp, implied by the Plaintiff's expert report, is not ready achievable because TOZZER, LTD is not authorized to use the sidewalk and any proposed ramp would obstruct the cellar doors.

16. If a ramp were constructed on Avenue A it would obstruct the use the Niagara's cellar doors, which are used daily. The cellar doors on Avenue A are critical to Niagara for deliveries, removing garbage and storage. Niagara could not operate if the cellar doors on Avenue A were obstructed.

17. If a ramp were constructed on East 7th it would obstruct the landlord's cellar doors. The cellar doors on East 7th is the only means of access to a portion of the basement that

was not leased to TOZZER, LTD because it contains the buildings mechanical systems, hot water heater, furnace and electrical panels, and various utility meters for the apartments above. The cellar doors on East 7th are critical to daily operation, particularly in the winter months when the tenants require hot water and heat.

18. At the time of Plaintiff's alleged visit and prior, TOZZER, LTD provided wheelchair patrons with entrance assistance. Niagara maintained a doorbell on the Avenue A entrance in the event a customer required assistance to enter.

19. Niagara maintains a temporary ramp and signage. A true and accurate photograph showing the doorbell and signage is attached hereto.

20. Plaintiff's purported expert alleged that Niagara failed to provide a ramp to bathrooms, without addressing its feasibility. According to my expert the required interior ramp would measure over 21 feet in length and would occupy a substantial amount of the space adjacent to the bar. Such a ramp would prohibit Niagara from operating as it would prevent the service of patrons at the bar. Accordingly, we use the aforementioned temporary ramp to grant wheelchair patrons access to the restrooms.

21. Plaintiff's purported expert claims violations with the bar and table heights. First, Niagara does not utilize tables in the bar area. To accommodate wheelchair patrons, however, Niagara does provide, upon request, a table that complies with the ADA.

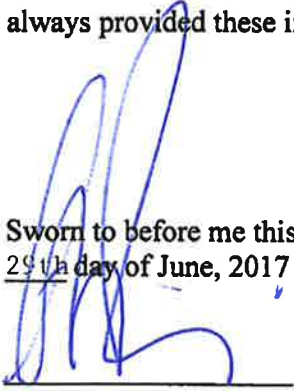
22. In addition, TOZZER, LTD have made the following readily achievable changes to Niagara:

(A) One restroom was designated for handicap use. A true and accurate photograph showing the designation is attached hereto.

- (B) Hand dryer was installed for patrons who would not reach the paper towel dispenser. A true and accurate photograph showing the hand dryer in the handicap designated restroom is attached hereto.
- (C) Grab bars were installed in the handicap designated restroom. A true and accurate photograph showing the grab bars in the handicap designated restroom is attached hereto.
- (D) Handicap accessible hardware, door handle and facet knobs, were installed in the restroom designated for handicap use. A true and accurate photograph showing the hardware is attached hereto.
- (E) The exposed pipe in the handicap designated restroom was covered. A true and accurate photograph showing the covered pipe in the handicap designated restroom is attached hereto.

23. On multiple occasions, individuals in wheelchairs and other disabilities have accessed, participated in and benefited from the service and music at Niagara. Defendant has always provided these individuals with an equal opportunity to visit and use Niagara.


LAURA FLAUTO-MCCARTHY


Sworn to before me this
29th day of June, 2017

Notary Public

STEVEN DISIERVI
No. 02DI6023343
State of New York
County of Kings
04/19/15 to 04/19/19

Plague



Doorbell and Signage



Handicap Designated Restroom and Door Knob



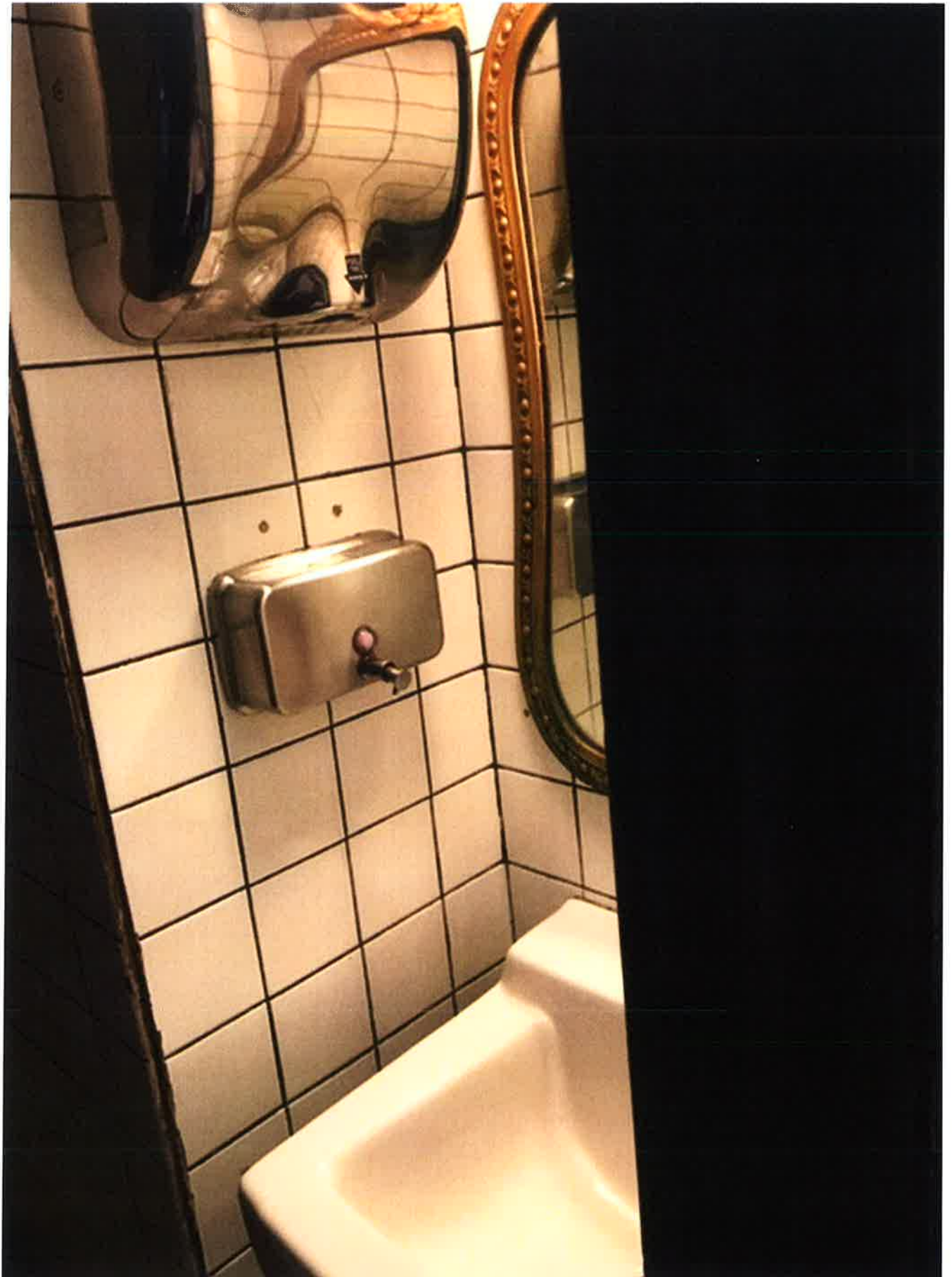
Grab Bars



Covered Sink Pipe and Hardware



Hand Dryer



NYS Department of State

Division of Corporations

Entity Information

The information contained in this database is current through June 26, 2017.

Selected Entity Name: TOZZER, LTD.

Selected Entity Status Information

Current Entity Name: TOZZER, LTD.

DOS ID #: 1602529

Initial DOS Filing Date: JANUARY 13, 1992

County: NEW YORK

Jurisdiction: NEW YORK

Entity Type: DOMESTIC BUSINESS CORPORATION

Current Entity Status: ACTIVE

Selected Entity Address Information

DOS Process (Address to which DOS will mail process if accepted on behalf of the entity)

TOZZER, LTD.

112 AVE A

NEW YORK, NEW YORK, 10009

Chief Executive Officer

LAURA FLAUTO-MCCARTHY

112 AVENUE A

NEW YORK, NEW YORK, 10009

Principal Executive Office

LAURA FLAUTO-MCCARTHY

200 4TH ST

GREENPORT, NEW YORK, 11944

Registered Agent

NONE

This office does not record information regarding the names and addresses of officers, shareholders or directors of nonprofessional corporations except the chief executive officer, if provided, which would be listed above. Professional corporations must include the name(s) and address(es) of the initial officers, directors, and shareholders in the initial certificate of incorporation, however this information is not recorded and only available by [viewing the certificate](#).

***Stock Information**

# of Shares	Type of Stock	\$ Value per Share
200	No Par Value	

*Stock information is applicable to domestic business corporations.

Name History

Filing Date	Name Type	Entity Name
JAN 13, 1992	Actual	TOZZER, LTD.

A **Fictitious** name must be used when the **Actual** name of a foreign entity is unavailable for use in New York State. The entity must use the fictitious name when conducting its activities or business in New York State.

NOTE: New York State does not issue organizational identification numbers.

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